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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 435

HARRY LEV,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF FOR PETITIONER LEV.

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PRELIMINARY STATEMENT.

The government's brief was served upon Petitioner one week prior to the argument before this Court. Because of this limitation of time, we respond to only the more salient government arguments. Accordingly, Petitioner here deals principally with the government's misinterpretation and misconception of *Jencks* v. *United States,* 353 U. S. 657 (1957) and 18 U.S.C. § 3500. Further, the Court's attention is again called to the flagrant error of the court below arising from its *in camera* examination of *ex parte* documents dehors the record and the government's failure to justify such examination. Finally, Petitioner urges that the errors here involved are most serious and harmful to him and deprive him of basic constitutional rights.

ARGUMENT.

I.

SUMMARIES OF ORAL STATEMENTS BY A WITNESS TO A GOVERNMENT AGENT ARE DISCOVERABLE UNDER 18 U.S.C. § 3500 AND ALSO UNDER JENCKS v. UNITED STATES, 353 U. S. 657, SINCE THE STATUTE DOES NOT PROVIDE THE EXCLUSIVE MEANS BY WHICH SUCH REPORTS ARE MADE PRODUCIBLE. TITLE 18 U.S.C. § 3500 IS UNCONSTITUTIONAL IF IT BE CONSTRUED TO PROHIBIT SUCH PRODUCTION.

The government's argument under Point I, here paraphrased, is that 18 U.S.C. § 3500 clarifies the decision of this Court in *Jencks* v. *United States*, 353 U. S. 657 (1957), and now provides the exclusive procedure by which a defendant may inspect a statement or report made to a government agent by a witness testifying against him; that 18 U.S.C. § 3500 reasonably and with a rational basis in experience excludes summaries prepared by agents of such statements[1]; that therefore the Carlin report being such a summary would not be producible to Petitioner in the event of a new trial (Govt. bf. pp. 30-61).

It is respectfully submitted that both of these premises are wrong. Further, to the extent that 18 U.S.C. § 3500 seeks to avoid the production of such summaries it is unconstitutional.

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[1]The government argues that **Jencks** supports this premise. (Govt. bf. pp. 56-58). Under its Point III, it argues that such summaries are not producible under **Jencks.** These arguments are substantially the same. Therefore, in order to avoid repetition, Petitioner responds to them under his Point I.

A. The Government's Contention that 18 U.S.C. § 3500 is Exclusive As to Procedure Governing Production of Statements of Witnesses is Incorrect. Accordingly, They Are Producible Under Jencks v. United States Even Though Such Statements and Reports may be Inadmissible in Evidence.

Petitioner has heretofore contended that the so-called *Jencks* statute was not exclusive by referring to its express terms and to its legislative history indicating the intent of Congress that it do not supersede or nullify production of statements otherwise required by any rule of court or procedure (Pet. bf. pp. 10-15). The government has failed to respond to Petitioner's argument in this respect except to state that Senate Report No. 981 and Senator O'Mahoney's brief filed with the Senate refer to that procedure as exclusive (Govt. bf. p. 49; Govt. bf. *Rosenberg* v. *United States,* No. 451, p. 35). This is hardly a response since the Senate report referred to related to the bill as originally proposed and prior to the amendments discussed by Petitioner. Further, Senator O'Mahoney's brief indicated on its face that the procedure discussed was not exclusive (103 Cong. Rec. 15939).

Petitioner also argued that since 18 U.S.C. § 3500 is not exclusive and was not intended to be, the Carlin statement, although a summary, is discoverable under *Jencks.* (Pet. bf. pp. 13-15).

The government attempts both here and under Point III of its brief to meet this by relying upon a statement of this Court in *Jencks,* taken out of context, to the effect that the tests of inconsistency for impeachment purposes when applied to a prior statement include not only flat contradiction but also omission of facts, a contrast in emphasis as to those facts and even a different order of treat-

ment. The government reasons that these tests are applicable only to prior statements "fully and directly attributable to the witness himself—as either his own written statements or their equivalent," since he cannot be impeached by a written report of what an investigator "said he said." (Govt. Bf. pp. 51, 56-58, 68, 69).

The argument of the government misconceives Petitioner's position in this respect as well as the rationale of the *Jencks* decision. Petitioner has never contended that a summary of Carlin's statement prepared by the Senate investigators could ever be introduced in evidence to impeach Carlin. He has only maintained that the summary is producible to him for such use in the cross-examination of Carlin as Petitioner is able to make. This Court has made clear in *Jencks* that this is his right when it stated, 353 U.S. 657, 669:

> "Relevancy and materiality for the purposes of production and inspection, with a view to use on cross-examination, are established when the reports are shown to relate to the testimony of the witness. Only after inspection of the reports by the accused, must the trial judge determine admissibility—*e.g.*, evidentiary questions of inconsistency, materiality, and relevancy—of the contents and the method to be employed for the elimination of parts immaterial or irrelevant."

This statement of two different standards of relevancy and materiality is a recognition by the Court that a report useful for discrediting purposes is producible even though *never admissible in evidence*. It follows, then, that inadmissible (hearsay or summary) reports of what a witness said are producible if his statements, no matter how reported, relate to the events concerning which he has testified. Such reports obviously could be effective on *cross-examination* to discover flat contradictions, omissions of

fact, contrasts in emphasis and a different order of treatment. If so, impeachment would follow *not* by introduction of the inadmissible report but by the verbal sworn testimony of the person to whom the statement was made. Such impeachments are commonplace in our courts. Accordingly, the hassles and harassments referred to by the government (Govt. bf. pp. 58-61) are highly illusory.

The government, also under its Point III, argues that *Jencks* does not here govern because 1) Carlin was not a crucial witness, 2) his statement to the Senate investigators was made long after the events it described and 3) he testified before a Senate Committee following his interview with the Senate investigators and the transcript of that testimony was utilized by the defense (Govt. bf. pp. 68, 69).

It is submitted that none of these arguments is valid. 1) Carlin was a most crucial witness as is hereinafter discussed (pp. 14-15). 2) The value of Carlin's prior statement does not depend upon its relation in time ot the events to which it refers. Its function in impeachment may be to demonstrate the witness' "capacity to err," "a moral disposition to lie," "partisan bias," "faulty observation" or "defective recollection." The inconsistent prior statement does not have any substantive testimonial value. III Wigmore, Evidence (3rd Ed. 1940) Secs. 1017, 1018). 3) The government's last mentioned argument hardly deserves response since it assumes that Carlin's statement to the Senate investigators and his testimony before the Senate Committee were the same.

B. Summaries of Oral Statements of Government Witnesses are Discoverable under 18 U. S. C. § 3500. If not, The Statute is unconstitutional and Infringes upon the Due Process Requirements of Jencks.

The government argues that 18 U.S.C. § 3500 requires production of only those statements of a witness to a government agent which could be used to impeach him.[1] It urges that this is a reasonable exercise of Congressional power to prescribe rules of evidence and procedure and has a rational basis in experience since one ought not to be impeached by a statement not his own (Govt. bf. pp. 49-55).

This construction of 18 U.S.C. § 3500 by the government drastically limits *Jencks* since under that decision inadmissible reports of oral statements are subject to production. But the government's construction cannot be correct since Congress and the government have piously avowed from time to time that 18 U.S.C. § 3500 was enacted merely to clarify the principle of *Jencks* and not in any sense to restrict it (Govt. bf. pp. 38-49).

Moreover, if Congress had intended to require the production only of reports of statements which were relevant and material in the evidentiary sense, then, despite its protestations to the contrary, it is in direct collision with the ruling of this Court. The question then arises as to the nature of that ruling. It is submitted that the language of this Court makes clear that a constitutional question of due process was decided. The Amici brief filed in *Rosenberg* v. *United States*, No. 451, elaborates this argument. Therefore, if Congress intended to abridge the *Jencks* ruling, 18 U.S.C. § 3500 is unconstitutional.

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[1] If the government is correct in this assertion, the main thrust of the statute is to reinstate the practice as to production of statements to the same status as pre-Jencks.

II.

THE CIRCUMSTANCES RELIED ON BY THE GOVERNMENT TO JUSTIFY THE EXAMINATION BY A REVIEWING COURT OF EXTRINSIC EVIDENCE HAVE NO APPLICATION HERE. IN ANY EVENT, SUCH EXAMINATION MAY NEVER BE MADE IN DEROGATION OF DEFENDANT'S RIGHT TO CROSS-EXAMINE WITH RESPECT TO SUCH EXTRINSIC EVIDENCE.

The government contends that the court below acted in the best judicial tradition in considering *in camera* the sealed Carlin statement and *ex parte* affidavits dehors the record supporting it. It urges that a "court may consider matters outside the record to determine whether a controversy does in fact exist." (Govt. bf. pp. 61, 62).

The cases cited in support of this proposition are singularly inapposite. They deal with the power of a court to consider extrinsic evidence when questions are raised as to mootness, collusiveness or the existence of a justiciable issue. The cases cited (*Mills, Kimball, American Book*) dealing with mootness decide only that if an event occurs *pending an appeal* rendering impossible the granting of any effectual relief, that event may be proved by extrinsic evidence. In reality this is merely a recognition that a court may at any time examine into its own jurisdiction. *Kimball* v. *Kimball*, 174 U. S. 158, 162 (1899). Of course, no jurisdictional problem was here raised by the filing of the sealed Carlin statement. Further, there is nothing in the foregoing cases indicating that even where it is proper to consider extrinsic evidence such consideration may be had *ex parte* and *in camera*.

The government's contentions, carried to their logical conclusion, would permit a reviewing court to consider *ex parte* evidence *in camera* even though it was never intro-

duced at the trial or made part of the record on appeal merely because such evidence, if believed by the court, would induce it to deny relief. This is an absurdity.

The government's cases (*Doremus* and *Johnson*) dealing respectively with the absence of a justiciable issue and collusiveness both indicate that the decisions were reached after a consideration of the trial court record. In *Doremus* the reviewing court considered the pleadings and in *Johnson* it dealt with affidavits and counter-affidavits filed in the trial court on a motion to dismiss. These cases involve situations entirely different from the case at bar and are not relevant to it.

The government also contends that there was no necessity for a *voir dire* examination of Senate investigator Balaban whose *ex parte* affidavit was considered by the court below (Govt. bf. pp. 63-65). That affidavit was to the effect that the sealed Carlin statement transmitted by the prosecutor was a memorandum prepared by Balaban of an oral statement made to him by Carlin, that it was not signed or adopted by Carlin and was not "a substantially verbatim recital" of that statement (R. 77, 78). The government urges that the definition of a statement under 18 U.S.C. § 3500 is so clear that no examination of Balaban could possibly bring the memorandum prepared by him within that definition (Govt. bf. p. 63). It must be kept in mind that petitioner has never seen the memorandum at all. He has no information relative to it except Balaban's description, purposely couched in the precise language of 18 U.S.C. § 3500, which was accepted by the court below at face value, plus the statement of the court below that "internal evidence" from the memorandum "tends" to bear out the Balaban description (R. 85). The reliance of the court below on Balaban's affidavit and its

less than positive statement as to the contents of the memorandum emphasize the serious error in depriving Petitioner of his right to cross examine.

The error in this denial is compounded when the state of the record before the court below is considered. In the trial court, Carlin, on cross examination, stated that he had given a statement concerning the events to which he had testified to Senate investigators Balaban and Poole and that he believed he had signed it (R. 46). This testimony was not challenged on the government's redirect examination and stood unopposed at the time *Jencks* was handed down and while the case at bar pended on appeal. There can be no question but that upon such a record reversal would have been mandatory under *Jencks* and also under 18 U.S.C. § 3500.

However, the filing of the Balaban affidavit, even if proper, raised an issue of fact as to whether there actually was in existence a signed Carlin statement. Had this issue been decided in favor of Petitioner, it would have assured reversal, as above stated, under both *Jencks* and 18 U. S. C. § 3500. The court below decided this issue adversely to Petitioner. It did and could have done so only by completely disregarding Carlin's sworn testimony and by giving full credence to the *ex parte* statement of one never submitted to the test of cross-examination. This is a clear violation of petitioner's constitutional rights under the Fifth and Sixth Amendments.

III.

THE TRIAL COURT'S FAILURE TO ORDER PRODUCTION OF THE SUMMARY OF CARLIN'S INTERVIEW DEPRIVED PETITIONER OF SUBSTANTIAL RIGHTS. IT THEREFORE CONSTITUTED REVERSIBLE ERROR.

A. The Form of the Indictment and the Trial Court's Failure to give Adequate Instructions Tied Petitioner's Fate to that of the Other Defendants.

The government's argument that the trial court's ruling on the Carlin report "had no effect whatever" as to Petitioner Lev (Govt. bf. p. 70) is a bare conclusion which ignores the record of a long and difficult trial.

Most of the trial's complexities were of the government's own making. They arose from the prosecution's insistence on joining nine defendants in a single trial for an alleged single conspiracy notwithstanding repeated and continuing objections by Petitioner that the evidence would—as it did—disclose at least two conspiracies, in one of which Petitioner admittedly had no part.[1] Having effectively employed the conspiracy dragnet to facilitate the jury's transference of guilt to Petitioner, the government now contends that in assessing the effect of an error made in the course of the trial, such assessment be made without any reference to the proof of the alleged conspiracy but only by testing the immediate relevance of the error to Petitioner. This argument is not only grossly unfair but unrealistic.

---

[1] Evidence was actually offered by the government of conspiracies relating to the procurement and administration of (a) a 1952 contract to manufacture garrison hats for the Army (hereafter referred to as the Bonita conspiracy) and (b) a 1953 contract to manufacture sailor hats for the Navy (hereafter referred to as the White Hat conspiracy). The government in the court below and the Court of Appeals conceded that Petitioner had no connection whatsoever with the Bonita conspiracy. (Tr. 4429-4494, 46).

Petitioner has maintained consistently that he was grievously prejudiced from being subjected to a trial involving a conspiracy (the Bonita contract) with which he had admittedly no connection.[1] Thousands of pages of testimony and hundreds of exhibits were devoted to the multifarious transactions and ramifications of that conspiracy. But for the aura of wholesale bribery and corruption which this evidence tended to generate—and inevitably associate with Petitioner in the minds of the jury—Petitioner might very well have been acquitted. Cf. *Paoli* v. *United States*, 352 U.S. 232 (1957).

The instructions of the trial court were far from adequate in protecting Petitioner from prejudice. The inconsistent, ambiguous and repetitious instructions which the trial court endlessly interspersed throughout the trial were likely to confuse the most clear-headed juror. Throughout the trial, the court vacillated between submitting the case to the jury on the theories of one conspiracy and two conspiracies (Tr. 46, 100, 101, 114, 115, 402, 483, 539, 1536-1538, 1840, 1843-1846).[2] He repeatedly told the jury that if Petitioner joined the conspiracy after it once commenced, he was chargeable with the prior acts and declarations of the other conspirators (Tr. 103, 115, 402). At the conclusion of the case, the trial court instructed the jury that there were two conspiracies and that Petitioner was not involved in the Bonita conspiracy (Tr. 4042, 4085). However, these instructions were buried in a 96-page charge which contained other instructions from which the jury could reasonably conclude that they were free to find that Petitioner had engaged in a single conspiracy with all other defendants, as charged in the indictment, and that, if the jury so

[1] See, e.g., Petition for Writ of Certiorari, pp. 12-22.

[2] References prefaced by "Tr." are to the trial transcript on file with this Court.

found, Petitioner would be bound by the acts and declarations of every other defendant (Tr. 4036, 4037, 4047, 4048, 4090, 4096).

The confusion inherent in these instructions and the jury's failure to understand them is demonstrated by the fact that the jury deliberated for approximately twelve hours and time and again returned to the courtroom to request further instructions. Significantly, the jury's final request was for an answer to the following question:

> "If a conspiracy existed on the Bonita contract and was not terminated by some act of the conspirators, does it then follow that:
>
> (a) The conspiracy continued during the course of the White Hat contract.
>
> (b) There had to be a conspiracy on the White Hat contract" (Tr. 4167).

The jury's question plainly indicated their inability to distinguish between the two conspiracies. In reply, the trial court instructed the jury that if they found that certain defendants were engaged in the Bonita conspiracy they could then find that as to some of these defendants there was a continuing conspiracy into the White Hat transactions (Tr. 4168). He then again stated that Petitioner was not a member of the Bonita conspiracy and could not be convicted unless the jury found him to be a member of the White Hat conspiracy (Tr. 4168, 4169). However, the judge then immediately repeated his earlier instruction that a conspiracy continues as long as there is an intention to continue it and that each conspirator "who is the agent of the other at *some time during the life of the conspiracy*, remains an agent during *all* of its existence" (Tr. 4169, emphasis added).

This last instruction completely destroyed any earlier efforts the trial court might have made to protect Petitioner from the Bonita evidence. Being a last-minute instruction, it should have been given with special care since the last word is often decisive. *Bollenbach* v. *United States*, 326 U. S. 607, 612 (1946). Nevertheless, this final instruction could be reasonably interpreted by the jury that they could find that there existed only one conspiracy and that all acts and declarations of those defendants who had engaged in the Bonita transactions were admissible against Petitioner although he might not have entered the conspiracy until its later White Hat phase. Significantly, within approximately one hour after this instruction, the jury found the Petitioner guilty (Tr. 4177).

Because of the trial court's inadequate instructions and its failure to resolve for the jury whether this case involved two conspiracies or a single conspiracy in two phases, the fact that Petitioner was not mentioned in Carlin's testimony is immaterial. If, as the facts tend to show, the jury understood the case to present a single conspiracy, the point that Carlin's testimony did not specifically involve Petitioner becomes entirely unimportant if Petitioner, in the jury's view, entered the alleged conspiracy at its later White Hat phase. Thereupon, under the court's instructions, the jury was required to consider Carlin's testimony also against Petitioner.

Moreover, even if the jury understood the case to present two distinct conspiracies, the result was the same. There is nothing in the great bulk of Carlin's testimony which ties it exclusively to the Bonita conspiracy. Carlin's testimony with respect to the relationship of defendant Rubin with certain other defendants is as pertinent to the White Hat conspiracy, in which Petitioner was al-

legedly involved, as to the Bonita conspiracy, in which he admittedly was not. In either event Petitioner was affected by Carlin's damaging testimony.

It follows that if the failure to compel the production of the Carlin statement was prejudicial to any of the defendant conspirators, it was prejudicial to Petitioner.

B. The Trial Court's Ruling on the Carlin Statement was Prejudicial Error.

The importance of Carlin's testimony can be appreciated only upon considering the sequence and character of the government's witnesses. Carlin was the first important government witness and the first witness to testify about the alleged conspiracy. It was Carlin's testimony which laid the groundwork for the government's entire case. His testimony—supplemented and explained by the trial judge in the presence of the jury (R. 46-48)—went to the inception and purpose of the alleged conspiracy and the means by which it was to be carried out. It opened the door and gave meaning to all the evidence that followed. Notwithstanding the government's contention to the contrary, Carlin's was the primary testimony with respect to the formation of the alleged conspiracy and that of Levy, Porreca and others was secondary and cumulative. Moreover, of all of the important government witnesses Carlin was the only one whose credibility was free from the taint of participation in the conspiracy or of admitted perjury. His occupation of certified public accountant may have further added to his influence on and credibility with the jury.

The inhibiting effect of the trial court's erroneous ruling on the cross-examination of all subsequent witnesses has been ably and fully dealt with in Part IV of Petitioner Rubin's brief. It need only be added here that Petitioner

Lev was in every way as adversely affected by this development as any of the other defendants.

The government's glib contention that defense counsel was not deterred by the court's emphatic ruling from requesting the production of other statements (Govt. bf. pp. 80-81) is both gratuitous and irrelevant. A reading of the record discloses that the trial judge had little patience with what he deemed unnecessary or lengthy objections or requests of counsel. Trial counsel for Petitioner, along with other counsel, came in for his full share of continuous judicial admonishment. After the court had taken time in chambers to carefully explain its position on the Carlin statement (R. 74), any further requests for statements of other witnesses would have been not only fruitless but foolhardy. In any event, failure to make such idle motions did not waive Petitioner's rights. The government's brief fails to cite a single authority to the contrary.

C. In the Face of the Jencks Rule the Trial Court's Ruling is Inherently Prejudicial.

The circumstances in the case at bar establish that the trial court's ruling had a substantial effect on the verdict. *Kotteakos v. United States*, 328 U.S. 750 (1946). However, even in the absence of such effect, the verdict would have to be reversed under the *Jencks* rule. This follows from the teaching of *Jencks* that the denial to an accused of evidence relevant and material to his defense is inherently prejudicial and harmful. An exposition of this argument is contained in the Amici brief filed in *Rosenberg v. United States*, No. 451, and, therefore, need not be restated here.

The government's attempt to refute this position is completely ineffectual. Its argument from the concurring

opinion of Justices Burton and Harlan in the *Jencks* case (Govt. bf. pp. 77-78) proves too much. Had the majority of this Court believed that an inquiry into the prejudicial effect of the trial court's ruling in that case was proper, it could have remanded to the trial court, just as the concurring justices suggested, for a determination of whether, in the light of the whole record, the denial to the defense of the statements was prejudicial. But it is precisely the holding that neither the trial court nor the prosecution—but only the defense—can and should have the occasion to make a determination of this nature which forms the heart of the majority's decision. Whether *Jencks* was founded on due process or not, a violation of its rule should be all that need be shown to obtain a reversal.

CONCLUSION.

The conviction of Petitioner was obtained in a trial in which there was a clear violation of the *Jencks* rule, both as defined by this Court and as enacted by Congress. Such violation constituted prejudicial error and deprived Petitioner of constitutional rights. The conviction must, therefore, be reversed.

Respectfully submitted,

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Attorney for Petitioner